STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2007
v	No. 267112 Wayne Circuit Court
DETRICK BUNDRAGE, Defendant-Appellant.	LC No. 05-006556-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 267576 Wayne Circuit Court
WILEY GREENHILL, Defendant-Appellant.	LC No. 05-006556-01

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In these consolidated cases, defendant Bundrage appeals by right his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced Bundrage to 27 to 50 years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant Greenhill appeals by right his jury trial conviction for second-degree murder. The trial court sentenced Greenhill to 17 to 40 years' imprisonment. We affirm both defendants' convictions, but remand Docket No. 267112 for resentencing.

Both defendants argue on appeal that the trial court prevented them from presenting a self-defense claim by ruling that the prosecution could cross-examine a potential defense witness, Donnel Lee, on the facts and circumstances of charges pending against him, thereby causing Lee not to testify. We review a challenge to a trial court's evidentiary ruling for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d (2000). The abuse of discretion standard is more deferential than de novo review, and it contemplates situations where there will be more than one reasonable and principled outcome. When the trial

court selects one of the principled outcomes, it does not abuse its discretion, and it is proper for the reviewing court to defer to the trial court's judgment. *People v Carnicom*, 272 Mich App 614, 616-617; ___ NW2d ___ (2006). Where decisions regarding the admission of evidence involve preliminary questions of law such as whether a rule of evidence or statute precludes admissibility, our review is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The prosecutor could not have cross-examined Lee on the facts and circumstances surrounding his pending case unless those facts and circumstances were relevant. Logical relevance is the foundation for admissibility. *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993). Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Here, the prosecutor wished to introduce evidence of the facts and circumstances of Lee's pending case to show that Lee was biased in favor of defendants. "Bias is a common-law evidentiary term used 'to describe the relationship between a party and a witness . . . in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.'" *People v Layher*, 464 Mich 756, 762; 631 NW2d 281 (2001), quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984). "'Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony.'" *Layher*, *supra* at 763, quoting *Abel*, *supra* at 52.

Defendants do not dispute that evidence of bias is generally admissible, but argue that the facts and circumstances of Lee's pending case do not show bias. As the prosecution argued and the trial court accepted, Lee's pending case was relevant to the issue of bias because of a possible deal between defendants and Lee to support their respective claims of self-defense. While no evidence of such a deal exists, "a defendant need not first demonstrate that some sort of deal exists before impeaching the witness in this manner as the cross-examination is a proper means to attempt to illicit the existence of a possible interest." *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). Nevertheless, while the prosecution was able to cross-examine Lee regarding the existence of any such deal, the facts and circumstances of Lee's case are irrelevant to any deal and, to the extent that the trial court would have allowed cross-examination into the facts of Lee's case because of a potential deal, it abused its discretion.

The trial court ruled, however, that the facts and circumstances of Lee's case were relevant to bias because the facts of Lee's case and defendants' case were so similar. The court's reasoning is consistent with our Supreme Court's holding in *Layher* where the trial court and our Supreme Court accepted the prosecution's argument "that as a result of [the witness'] being accused and acquitted of a crime which he claims he did not do of a very similar nature, . . . he is therefore biased in the Defendant's favor and presumably would color his testimony to help the Defendant, another person who he may believe would also be wrongly accused of the same crime." *Layher*, *supra* at 764. We therefore conclude that evidence of the facts and circumstances of Lee's case are relevant to the issue of bias, and thus admissible, because Lee's own experience of being arrested and charged with a crime he claims he did not commit, may have induced him to slant his testimony in defendants' favor.

Because the evidence of bias arising from the pending trial is relevant, it is admissible so long as its probative value is not substantially outweighed by the danger of unfair prejudice. MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court is in the best position to gauge the effect of such testimony. *VanderVliet*, *supra* at 81. In this case, while there is some danger that the jury might give undue weight to the fact that Lee is accused of a similar crime, especially after hearing all the facts and circumstance surrounding his case, we conclude that the trial court did not abuse its discretion in finding that the danger of undue prejudice was not substantially outweighed by the probative value of the evidence. There were numerous eyewitnesses to the shooting, both defendants gave statements to the police, and the trial court was willing to give a limiting instruction to the jury on the use of the evidence.

Bundrage also argues on appeal that he was denied his right to confrontation by the admission of portions of Greenhill's statements to the police. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Bundrage did not preserve this issue by objecting below that his right to confrontation was violated by the admission of Greenhill's statements.

We review unpreserved issues for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) the error occurred, (2) the error was plain, i.e., clear and obvious, and (3) the plain error affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden with respect to prejudice. *Id.* Once the defendant establishes those three elements, the appellate court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

The Confrontation Clause of the Sixth Amendment bars the admission of "testimonial" statements of a witness who does not testify at trial, unless the witness was unavailable, and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). While the Supreme Court in *Crawford* declined to provide a comprehensive definition of what constitutes testimonial evidence, it did conclude that "statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 52. But the Confrontation "Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n 9 (citation omitted).

In this case, portions of Greenhill's recorded statements were admitted even though Greenhill had given them in response to structured police questioning after he was in custody and had received *Miranda* warnings, and although Bundrage never had an opportunity to cross-examine Greenhill on those statements. Nonetheless, except for an identification of Bundrage, nothing from Greenhill's statements was discussed, and it is clear that testimony that Bundrage was discussed in Greenhill's first statement and identified in Greenhill's second statement was offered only for the purpose of showing why the police interviewed Bundrage. Because the

statements were not offered for the truth of the matter asserted, it was not plain error to admit them.

In any event, even if the trial court plainly erred in admitting Greenhill's statements, Bundrage cannot meet his burden of showing prejudice by establishing that the error affected the outcome of the lower court proceedings. *Carines, supra* at 763. The mere fact that Greenhill mentioned Bundrage in his first statement and identifed him in his second, did not establish anything. Moreover, an eyewitness had already identifed Bundrage as the shooter, and Bundrage admitted in his own statement to the police that he had been in an altercation with the victim. Given the other properly admitted evidence and Bundrage's attorney's frequent questions and arguments suggesting that Bundrage acted in self-defense, we conclude that Bundrage was not prejudiced by the admission of parts of Greenhill's statements.

Bundrage further argues on appeal that the trial court erred in scoring offense variable three (OV-3) when sentencing him. "This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Here, the prosecution concedes that Bundrage is entitled to resentencing because the trial court erroneously assessed 50 points for OV-3 instead of 25 points. Therefore, Bundrage is entitled to resentencing because there was a scoring error, the scoring error altered the appropriate guidelines range, and Bundrage preserved the issue. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

We affirm in Docket No. 267576. We affirm in part and reverse in part in Docket No. 267112 and remand for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey